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No. 03-257

In The
Supreme Court of the United States

FIDELITY EXPLORATION & PRODUCTION COMPANY,

Petitioner,

v.

NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the discharge into a navigable river or stream of contaminated groundwater generated as the waste byproduct of an industrial process, resulting in the addition to the waters of the United States of pollutants not previously present in such waters, requires an NPDES permit under the Clean Water Act.

2. Whether, in light of the significant differences between this case and *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626, there is any reason for this Court to "hold" this petition pending its disposition of that case.

CORPORATE DISCLOSURE STATEMENT

Respondent Northern Plains Resource Council, Inc., is a Montana non-profit membership corporation. It does not issue shares of stock and has no corporate parents.

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INTRODUCTION

Although petitioner Fidelity Exploration & Production Company asks this Court to grant certiorari in this case, the only real issue presented by the petition for certiorari is whether it should be held pending this Court's disposition of *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626. Fidelity contends that this case presents the same issue on which the Court granted certiorari in *Miccosukee*, and it relies on precisely the same asserted conflict among the circuits that was the subject of the petition for certiorari in *Miccosukee*. Nowhere does Fidelity's petition suggest any reason why this Court should hear this case *in addition* to hearing *Miccosukee*, in which it has already granted certiorari to resolve the issue Fidelity claims this case presents. Thus, even if all of Fidelity's arguments were taken at face value, the consequence would not be a grant of certiorari in this case, but rather deferral of consideration of Fidelity's petition pending the decision in *Miccosukee*.

But Fidelity's arguments should not be taken at face value. There is a major difference between the issue presented in this case and that in *Miccosukee*: In *Miccosukee*, the question is whether pumping already contaminated water from one body of navigable water to another constitutes the "addition" of pollutants to navigable waters of the United States within the meaning of the Clean Water Act ("CWA"). In this case, by contrast, pollutants *not* already present in *any* navigable waters are being added to navigable waters when, as a byproduct of the industrial process of coal bed methane extraction, contaminated groundwater that would not otherwise reach any navigable body of water is discharged into navigable rivers and streams. Resolution of the issue in *Miccosukee* in favor of

the petitioners in that case therefore would not control the outcome of this case. Indeed, Fidelity did not even raise the *Miccosukee* "addition" issue below; its contention was only that its wastewater was not a "pollutant" at all – an issue not present in *Miccosukee*.

Moreover, none of the cases relied on by Fidelity (or by the petitioner in *Miccosukee*) holds that an NPDES permit is not required when pollutants not already present in navigable waters are added to navigable waters as the result of an industrial discharge of groundwater. There is not even any arguable conflict among the circuits over the issue actually decided by the Ninth Circuit: namely, whether wastewater produced by oil and gas drilling is a "pollutant" under the Clean Water Act. Indeed, in the only appellate decision that has addressed the issue, *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), the Fifth Circuit held, consistent with the Ninth Circuit ruling below, that such "produced water" is a "pollutant." And unlike in *Miccosukee*, where the federal government supports the petitioner's position that pumping between navigable waters is not subject to the NPDES permit requirement, the EPA has rejected the position of the petitioner in *this* case, and has taken the position that industrial discharges of contaminated groundwater into navigable waters do require a permit. Thus, not only is the question presented in *Miccosukee* not controlling here, but there is also no independent reason for the Court to consider the different issue this case presents.

Accordingly, the proper disposition of this petition is neither to grant it nor to hold it pending the disposition in *Miccosukee*, but to deny it now.

STATEMENT OF THE CASE

This case is a Clean Water Act "citizen suit" brought by respondent Northern Plains Resource Council ("Northern Plains"), a grassroots conservation and family agriculture group dedicated to protecting Montana's water quality and family farms and ranches. Petitioner Fidelity Exploration & Production Company is engaged in the commercial production of natural gas in the West. The suit challenges Fidelity's unpermitted discharges of contaminated groundwater generated by the production of coal-bed methane gas into the Tongue River and one of its tributaries, Squirrel Creek, in southeastern Montana. Coal-bed methane is natural gas that occurs together with groundwater in the interstices of underground coal seams. The production of coal-bed methane involves pumping the groundwater and gas to the surface, where the gas separates from the water. Fidelity's facility at issue here is the CX Field, encompassing nearly 250 wells, and associated pipelines, compressor stations, electrical lines and other facilities.

The wastewater that Fidelity produces through this process (referred to as "CBM water") contains numerous contaminants, including suspended solids, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, fluoride, aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium. As the Ninth Circuit recognized, CBM water is over three times more salty than the Tongue River in its natural state, and it has a sodium adsorption ratio (SAR)

40-60 times higher than the Tongue.[1] If it were not pumped to the surface in Fidelity's methane production process, the coal-bed methane water would have no way of reaching surface bodies of water, with which it lacks any hydrological connection.

Though Fidelity lauds the virtues of its CBM wastewater, Pet. 3, all of the water at issue here is, or was, discharged into the Tongue River, or its tributary Squirrel Creek, as an unwanted byproduct of its commercial gas extraction operation. Fidelity's wastewater is not used for agricultural purposes, and irrigators do not want it. Southeastern Montana is an arid land, and the area's farmers and ranchers are dependent on high quality irrigation water from the Tongue to sustain their operations. All of the major holders of irrigation water rights on the Tongue have, from the outset, opposed Fidelity's discharges.[2]

Northern Plains' farmer and rancher members are concerned about Fidelity's discharges because the salts

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[1] SAR is the ratio of sodium to calcium and magnesium in water. The SAR of the Tongue is generally less than 1. CBM wastewater, according to Fidelity's data, has an SAR that averages 47. The state of Montana has just adopted water quality standards for the Tongue River for SAR that range from 3 to 4.5 depending on the season. Montana determined that these standards were necessary to protect agriculture from the impacts of CBM discharges. A.R.M. § 17.30.670 (2003).

[2] In addition to the many Tongue River irrigators that are members of Northern Plains, the two major water right holders on the Tongue, the Tongue River Water Users Association and the T&Y Irrigation District, appeared as *amici curiae* supporting Northern Plains before the Ninth Circuit. In addition, the Northern Cheyenne Tribe, another principal water right holder on the Tongue, also filed an *amicus* brief in support of Northern Plains.

and heavy metals with which they are laden are deleterious to crops, soils and aquatic life. The harmful impact of accumulated salts in soils used for growing crops is an age-old problem, and one that Western farmers must confront each season. CBM water is thus dangerous for irrigators: "[H]igh SAR water, like CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water." Pet. App. 4a. The irrigated alfalfa fields and family gardens of the Tongue River valley, because they contain "clayey" soils, are particularly susceptible to SAR damage. Even Fidelity's own expert opined that "the SAR of CBM water creates a permeability hazard and precludes its use for irrigation without mixing, treatment or addition." Pet. App. 4a. The Montana Department of Environmental Quality (MDEQ) also warns that the unregulated discharge of CBM water would cause "[s]urface water quality in some watersheds [to] be slightly to severely degraded . . . " Pet. App. 4a-5a.

In August 1998, Fidelity informed the Montana Department of Environmental Quality that it wished to discharge the wastewater from its coal-bed methane operations into the Tongue River and Squirrel Creek. The Department informed Fidelity that under a Montana statute, a discharge of groundwater that was not altered from its ambient quality did not require a permit. However, the Department also informed Fidelity that the EPA had taken the position that the CWA did not permit the state to exempt such discharges from the requirement of a permit under the National Pollutant Discharge Elimination System (NPDES).

Even in the face of the information that the EPA considered such unpermitted discharges unlawful, Fidelity

chose to proceed with discharges to both the Tongue River and Squirrel Creek without first obtaining a permit. In December, 1999, Fidelity evidently reconsidered the wisdom of this course of action and applied for a permit, but continued the unpermitted discharges pending action on its application. In June, 2000, respondent Northern Plains, on behalf of ranchers and farmers that use surface waters in the vicinity of Fidelity's operations, filed a citizen suit under the CWA alleging that Fidelity had engaged in unpermitted discharges to the Tongue River and Squirrel Creek. At around the same time, Montana's DEQ issued an NPDES permit for discharges to the Tongue River, and denied a permit for Fidelity's discharges to Squirrel Creek. Northern Plains subsequently amended its complaint to allege additional unpermitted discharges when Fidelity continued to discharge CBM water into the Tongue River from outfalls not covered by the permit.

The district court granted summary judgment to Fidelity, holding that the CBM water discharged by Fidelity was not a "pollutant" under the CWA because Fidelity had not altered it from its natural state. The issue Fidelity raises here, whether Fidelity's activities constituted an "addition" or "discharge," was not raised below. The court also held that because EPA had not revoked Montana's entire permitting program under the CWA, the state statute purporting to exempt discharges of unaltered groundwater from the permit requirement was effective even if it would otherwise violate the CWA.

On appeal, a unanimous panel of the Ninth Circuit reversed. The court began by observing that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342." Pet. App.

8a. Given the parties' agreement that Fidelity had discharged its wastewater from a point source into navigable waters without a permit, the court stated, "we need only decide whether the groundwater derived from CBM [coalbed methane] extraction is a 'pollutant' within the meaning of the CWA." *Id.*

The court began its analysis with the statutory definition of "pollutant":

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and *industrial,* municipal, and agricultural *waste* discharged into water. This term does not mean . . . water, gas, or other material which is injected into a well to facilitate production of oil and gas, *or water derived in association with oil or gas production and disposed of in a well,* if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

Pet. App. 8a (quoting 33 U.S.C. § 1362(6)) (emphasis added by the court). The court held, first, that the water discharged by Fidelity fell easily within this definition because it was "industrial waste" – that is, the "useless byproduct derived from the commercial production and sale of goods and services." Pet. App. 10a. The court reasoned: "Because Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM

water falls squarely within the ordinary meaning of 'industrial waste.'" *Id.*

Second, the court relied on an EPA regulation defining the term "pollutant" to include "produced water," or "water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas" (40 C.F.R. §§ 435.41(bb), 435.11(bb)). Pet. App. 11a.[3] The court noted that the CWA only exempts such produced water from the permit requirement "when the water is disposed of in a well and will not result in the degradation of other water bodies." *Id.* (citing 33 U.S.C. § 1362(6)(B)). Agreeing with the Fifth Circuit's decision in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d at 562-69, the court held that "produced water" as defined by EPA meets the statutory definition of a "pollutant."

Third, and least significant to its decision, the court noted that considering Fidelity's wastewater a "pollutant" was "consistent with the CWA's definition of 'pollution'" as the "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water."[4]

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[3] Petitioner notes that the definition referenced by the Ninth Circuit for the term "produced water" is contained in Subcategories A and D ("Offshore" and "Coastal"), rather than in Subcategory C ("Onshore") of the Oil and Gas Extraction Point Source Categories set forth in 40 C.F.R. § 435. *See* Pet. 20 n. 9. However, what Petitioner does not mention is that while Subcategory C "Onshore" *uses* the term "produced water," it does not define that term. 40 C.F.R. § 435.31-32. The Ninth Circuit reasonably referred to the preceding and following subcategories within the same Part for the definition of the term.

[4] Indeed, the appellate court's discussion of the term "pollution," was prompted by the need to correct the district court's misapplication of the term to the discharged industrial wastewater, rather than to the

(Continued on following page)

Pet. App. 11a (citing 33 U.S.C. § 1362(19).). The court pointed out that although Fidelity had not altered the integrity of the pumped groundwater, it had altered the integrity of the receiving stream; and, citing the Eleventh Circuit's decision in *Miccosukee*, the court noted that the requirement of a "man-induced" alteration "refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man." Pet. App. 12a (citing *Miccosukee Tribe v. South Florida Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002)).

The court further observed, in response to Fidelity's assertion that it was discharging "only water," that "other circuits have held that transporting water from one water body to another can violate the CWA." Pet. App. 14a-15a (citing *Miccosukee Tribe*, 280 F.3d at 1367; *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492-93 (2d Cir. 2001); *Dubois v. Department of Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996)). The court acknowledged that, as Fidelity had pointed out, those cases involved whether there was an "addition" of pollutants to the waters of the United States, not the definition of "pollutant," but the court saw the cases as "practically indistinguishable" insofar as they necessarily presupposed that the discharged water was (or contained) a "pollutant." Pet. App. 15a.

Finally, in a portion of its ruling not challenged by Fidelity here, the court rejected the district court's holding that because EPA had "approved" Montana's permitting

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receiving water, where the "pollution" causes adverse impacts on water quality.

scheme, the Montana statute that purported to exempt Fidelity's discharges of unaltered groundwater from the permit requirement was effective even if the wastewater was a "pollutant" under the CWA. The court held that neither EPA nor Montana had authority to exempt discharges of pollutants for which the CWA requires a permit.

In accordance with these holdings, the Ninth Circuit reversed the grant of summary judgment for Fidelity and remanded the case for entry of summary judgment on liability in favor of Northern Plains.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT THE ISSUE BEFORE THE COURT IN *MICCOSUKEE*.

A. Unlike *Miccosukee*, This Case Involves the Addition to Navigable Waters of Pollutants Not Previously Present in Any Navigable Waters.

The CWA requires an NPDES permit for the "discharge of any pollutant," and goes on to define "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(12). Thus, for a permit to be required, "five elements must be present: (1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Fidelity stipulated before the District Court that Northern Plains satisfied all of these elements save for whether CBM wastewater is a "pollutant." Therefore both the District Court and the Ninth Circuit focused their opinions on whether CBM wastewater is a "pollutant" as

defined in 33 U.S.C. § 1362(6). Fidelity did not address the "addition" issue that is the basis for *Miccosukee* nor did it cite the principal cases it now relies upon. As discussed in Section I B, *infra.*, Fidelity's failure to raise below the issue it now relies exclusively upon is grounds alone for denying the Petition. That fact notwithstanding, *Miccosukee* raises an issue that is not present in this case.

The issue before this Court in *Miccosukee* is whether the pumping of polluted water from one navigable body of water to another, adjoining body of navigable water constitutes the "addition" of a pollutant to navigable waters. The petitioner in *Miccosukee* sought review of that issue by this Court to resolve an arguable conflict over this issue between two lines of appellate decisions.

One line of cases, consisting of the D.C. Circuit's opinion in *Gorsuch* and the Sixth Circuit's decision in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), held that when polluted water was discharged from a dam or impoundment into a downstream water body, there was no "addition" of pollutants, because the pollutants were already present in "navigable waters." According to the analysis of these cases (which the petitioner in *Miccosukee* endorses), "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world," and "the point or nonpoint character of pollution is established *when the pollutant first enters navigable water*, and does not change when the polluted water later passes . . . from one body of navigable water . . . to another. . . . " *Gorsuch*, 693 F.2d at 175 (emphasis added); *see also Consumers Power*, 862 F.2d at 584.

The other line of cases, comprising the Eleventh Circuit's decision in *Miccosukee* as well as *Dubois v. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), and *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001), held that when polluted water was transferred (through a point source) from one body of navigable water to another, separate body of water, there was an "addition" of pollutants to navigable waters.[5]

The issue that is posed in *Miccosukee*, and that at least arguably divided the courts of appeals, is not present in this case. Unlike the cases relied on both by the petitioner in *Miccosukee* and Fidelity here, this case involves a point source from which the relevant pollutant, in the words of the *Gorsuch* court, "first enters navigable water" from "the outside world." 693 F.2d at 175. Until Fidelity discharged its contaminated wastewater into the Tongue

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[5] The courts in the second line of cases distinguished the first line on the ground that the bodies of water at issue in the first line were not actually separate: *Gorsuch* involved a discharge of water through a dam from a river upstream to the same river downstream, and *Consumers Power* involved pumping water from Lake Michigan into an impoundment and then back to Lake Michigan through a power generation facility. Thus, at least arguably, the receiving body of water in those cases got no pollutants that were not already present in it. In recommending that the Court not grant certiorari in *Miccosukee*, the Solicitor General accordingly took the view that there was no direct conflict (*see*, Brief for the United States as Amicus Curiae, No. 02-626 (filed May 30, 2003)). In granting certiorari, however, this Court apparently concluded that the tension among the cases was sufficient to merit review, and the brief on the merits of the United States now takes the position that "the distinction suggested by those courts is unsound." Brief for the United States as Amicus Curiae Supporting Petitioners, No. 02-626, at 18 (filed Sept. 10, 2003).

River or Squirrel Creek, that polluted water was not present in any "navigable waters" – it was confined to coal bed seams lacking any hydrological connection to navigable lakes, rivers, streams or ponds. Thus, under the analysis of either the *Gorsuch* line of cases or the *Miccosukee* line, Fidelity's discharge of industrial wastewater to navigable waters constituted an "addition" to navigable waters of pollutants that were not previously present in any navigable waters. In other words, whichever view of the issue the Court selects in *Miccosukee*, the outcome of this case will not be affected.

The merits brief of the United States in *Miccosukee* makes this point crystal clear. Summarizing the statutory argument for finding no "addition" of pollutants on the facts of that case, the government's brief states:

> Section 502(12) makes clear that, in order to qualify as a "discharge of a pollutant," the activity must add a pollutant from a "point source" to "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. 1362(12); see CWA § 502(7), 33 U.S.C. 1362(7); 40 C.F.R. 122.2. Section 502(12) cannot reasonably be understood to include an activity that merely transports navigable waters from one location, through a "point source," to another location. Such an activity can conceivably lead to changes in water quality, but it does not, within the normal meaning of the relevant terms, constitute an "addition" of any pollutant to "the waters of the United States." See *Webster's Third New International Dictionary* 24 (1993) (defining "addition" in relevant part, as "the joining or uniting of one thing to another"). Whatever pollutants the waters contain are already *in* "the waters of the United States" when those waters pass through

> the "point source." The point source merely conveys those waters, which retain their status as navigable waters.

Brief for the United States as Amicus Curiae Supporting Petitioners, No. 02-626, at 16 (filed Sept. 10, 2003). This argument, even if this Court accepted it in *Miccosukee*, would cast not the slightest doubt on the outcome in this case. Indeed, it would only confirm the Ninth Circuit's holding, for the discharge to a navigable stream of polluted water not previously present in any navigable waters would, "within the normal meaning of the relevant terms, constitute an 'addition' of [a] pollutant to 'the waters of the United States.'" *Id.*[6]

B. Fidelity Did Not Raise the "Addition" Issue Below.

That the issue in *Miccosukee* is entirely distinct from that presented by this case is underscored by the fact that, in the courts below, Fidelity did not even *argue* the *Miccosukee* issue. That is, it did *not* argue that, if its contaminated groundwater constituted or contained a pollutant, there was no "addition" of that pollutant to navigable waters. Rather, the only issue it argued as to the applicability of the CWA to its discharges was that the discharges

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[6] Notably, the Solicitor General cited the Ninth Circuit's decision with approval in its brief opposing certiorari in *Miccosukee*, *see*, Brief for the United States as Amicus Curiae, No. 02-626, at 14-15 (filed May 30, 2003). Its merits brief in *Miccosukee*, while criticizing *Dubois* and *Catskill Mountains* (*see*, Brief for the United States as Amicus Curiae Supporting Petitioners, No. 02-626, at 18-19 (filed Sept. 10, 2003)), studiously avoids any similar criticism (or mention) of the decision in this case below.

did not involve a "pollutant." Indeed, in the district court, Fidelity stipulated that all the elements necessary to require a permit under the CWA were present except for the claimed absence of a "pollutant." Fidelity agreed with the District Court that the issue for determination was whether CBM water is a pollutant within the meaning of 33 U.S.C. § 1362(6). And in the Ninth Circuit, Fidelity did not even cite the principal authorities relied on in its petition (*Gorsuch* and *Consumers Power*), and it argued that *Miccosukee*, *Dubois* and *Catskill Mountains* were *irrelevant* because they only involved the "addition" issue, and not the definition of "pollutant."[7]

Having bypassed the "addition" issue below, Fidelity cannot now resurrect it as a basis for jumping onto the *Miccosukee* bandwagon. This Court will not grant relief on the basis of issues neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2002). Thus, even if the issue to be resolved in *Miccosukee* did have a bearing on the proper outcome of this case (which it does not), petitioners waived any entitlement to benefit from this Court's resolution of that issue by failing to raise it (and, indeed, affirmatively asserting its irrelevance) below.

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[7] The Ninth Circuit's observation that those cases were "practically indistinguishable," which Fidelity repeatedly takes out of context, meant only that they presupposed that at least some of the discharges at issue in them involved a "pollutant" (as did *Gorsuch* and *Consumers Power*), *not* that this case involved the same issue regarding "addition" as those cases.

II. THE NINTH CIRCUIT'S DECISION THAT FIDELITY'S DISCHARGES INVOLVE A "POLLUTANT" WAS CORRECT, CONFLICTS WITH NO OTHER APPELLATE AUTHORITY, AND DOES NOT MERIT REVIEW BY THIS COURT.

A. The Decision is Correct.

The issue actually decided by the Ninth Circuit – that the contaminated wastewater discharged by Fidelity into the rivers and streams of Montana is a "pollutant" – also does not merit review by this Court. To begin with, that decision is, under the plain terms of the statute, correct. As the Ninth Circuit explained, the statute expressly provides that the term "pollutant" includes "industrial waste," and the contaminated wastewater generated by Fidelity's industrial process clearly falls within the ordinary meaning of that term, regardless of the fact that it was contaminated before Fidelity pumped it out of the ground and discharged it.

The statute also specifically provides that the term "pollutant" does not include "water derived in association with oil or gas production *and disposed of in a well, if* the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, *and if* such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." 33 U.S.C. § 1362(6)(B) (emphasis added). The clear implication of this provision is that "water derived in association with oil or gas production" *is* a pollutant if it does *not* meet these criteria – that is, if it is *not* disposed of in a well approved of by the state after a determination that such disposal will not degrade ground or surface water. There can be no dispute, in this case, that the water discharged by Fidelity is "derived in

association with . . . gas production" and that it is not being disposed of in a well. Thus, as the Ninth Circuit correctly concluded, it meets the statutory definition of a "pollutant."

Moreover, as the Ninth Circuit noted, the EPA has consistently taken the position that contaminated groundwater pumped and discharged in connection with oil and gas production is a "pollutant," and that its addition to navigable waters requires a permit. Pet. App. 17a n. 5.[8] In further recognition that CBM water is a pollutant regulated by the NPDES program, EPA is developing a Best Professional Judgment (BPJ) determination to provide guidance to states, Tribes, and industry regarding treatment and disposal options for CBM produced waters. According to EPA, the process will "finalize the BPJ determination for Coalbed Methane produced waters, for use in Region 8's Clean Water Act. . . . NPDES permitting activities." 66 Fed. Reg. 46455 (Sept. 25, 2001). The **only** reason that EPA has undertaken a BPJ process is because CBM water is a pollutant subject to regulation under the NPDES program of the CWA. In this respect, too, this case is unlike *Miccosukee* where EPA's position on the merits is that no discharge permit was required for the water management district's discharges.

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[8] The Ninth Circuit showed proper deference to EPA's regulations. Such deference further aligns this case with the holding in *Gorsuch*, where the Court showed considerable deference to EPA's interpretation of what discharges are regulated as pollutants by the NPDES program. *See e.g.*, *Gorsuch*, 693 F.2d at 174, n. 56.

B. There is No Conflict on the "Pollutant" Issue.

Tellingly, Fidelity points to *no* case authority, let alone federal appellate authority, that conflicts with the Ninth Circuit's holding that contaminated groundwater pumped in connection with oil or gas production is a "pollutant." Indeed, the only other appellate decision that addresses this issue, the Fifth Circuit's decision in *Cedar Point Oil*, is fully consistent with the Ninth Circuit's decision on this point. There, the Fifth Circuit squarely held that wastewater produced in the pumping of oil or gas "is clearly subsumed by the phrases 'chemical wastes' and 'industrial wastes,'" 73 F.3d at 568, a conclusion the Fifth Circuit found to be bolstered by EPA's "produced water" regulations. *See id.*

Fidelity attempts to distinguish *Cedar Point* by erroneously asserting that its holding was premised on a finding that the produced water contained chemicals added during the drilling process. Pet. 20. However, nothing in the Fifth Circuit's opinion suggests that that fact was dispositive, and, as the court below correctly noted, the EPA regulations on which both it and the Fifth Circuit relied do not require that chemicals be added to produced water before an NPDES permit is required. Pet. App. 10a-11a. In any event, suggesting that *Cedar Point* may be distinguishable falls far short of establishing that it or any other appellate decision *conflicts* with the Ninth Circuit's holding.

Beyond *Cedar Point*, not one of the handful of other cases cited in Fidelity's petition addresses the issue

decided below at all.[9] Fidelity cites no cases holding that a permit is not required for discharges of contaminated groundwater pumped by oil and gas producers (or indeed, by any other industrial concerns), for the simple reason that there are none.[10]

The only case that Fidelity even attempts to argue is in conflict with the Ninth Circuit's ruling on the "pollutant" issue – *Gorsuch* – is, if anything, supportive of the Ninth Circuit's ruling on this point. In *Gorsuch*, the D.C. Circuit deferred to EPA's view that water that had low dissolved oxygen, low temperature, and/or was "supersaturated" with air as a result of its discharge through a dam was not a "pollutant," largely because none of these conditions was encompassed by the statutory definition of "pollutant." 693 F.2d at 171. However, the court did not question that the presence in the water of elevated levels of dissolved mineral contaminants met the definition of "pollutant," even though their presence was the result of natural processes occurring in the reservoir upstream of the dam. *See, e.g., id.* at 163, 166-67, 171-75 & n. 57. Indeed, if no "pollutant" had been present, the court would

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[9] At pages 18-20 of its petition, Fidelity argues that some of the cases relied on by the Ninth Circuit in support of its ruling that this process wastewater is a pollutant are *distinguishable*, but none of them even arguably is in *conflict* with the Ninth Circuit's holding.

[10] The two district court cases to address CBM discharges also recognized CBM wastewater as a pollutant requiring an NPDES permit. *Swarz v. Beach,* 229 F. Supp. 2d 1239, 1248 (D. Wy. 2002) (discussing the SAR and salinity of CBM process water as particularly problematic for irrigators); *Southern Colorado C.U.R.E v. Evergreen Operating Corp.*, 98-WM-1518, Magistrate's Findings at 23 (finding that coalbed methane "produced water" is a pollutant, despite fact that the oil company added nothing to the produced water).

not have had to reach the question whether the discharge of a pollutant from a dam constituted the "addition" of a pollutant to the waters downstream. *See id.* at 174-75. Thus, *Gorsuch* is fully consistent with the Ninth Circuit's holding that Fidelity's wastewater, which similarly contains elevated levels of dissolved mineral contaminants, is a "pollutant."

In short, Fidelity has cited no decision *holding* that wastewater of the type discharged by Fidelity is *not* a pollutant, and the principal decision on which it relies not only involves very different facts, but is also consistent with the Ninth Circuit's holding on the "pollutant" issue. Absent anything even approaching a conflict among the circuits over the question, Fidelity offers no reason why the issue is of such compelling importance that this Court should reconsider the Ninth Circuit's resolution of the factbound question of the application of the statutory definition of "pollutant" to the particular facts of this case.

C. There are No Other Important Reasons for Reviewing the Decision Below.

The Ninth Circuit's disposition does not break new ground under the CWA. Rather, it is a typical fact-specific determination that a particular discharge constitutes a pollutant, the type of determination that courts routinely make. *See e.g., United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (ordinary dirt is a pollutant); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (finding that liquid manure is a pollutant because definitional list includes solid waste, sewage, biological materials, and agricultural waste); *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977) (gasoline

is a pollutant though not listed in the definitional list because Congress intended broad reading of term pollutant).

Much of Fidelity's argument that the Ninth Circuit's decision has far-reaching, novel implications rests upon its assertion that CBM water is "natural" and that Fidelity adds no chemicals to it before discharge. Pet. 18. Fidelity's argument contravenes the plain language of the CWA, which defines "pollutant" to include, *inter alia,* such "natural" substances as ordinary sand and rock. 33 U.S.C. § 1362(6). The proper inquiry is not whether a substance is "natural" in its original state, but whether some transformative human activity puts the substance in a place where it does not belong. As Judge Michael of the Fourth Circuit explained:

> The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. . . . It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before. *See*, 33 U.S.C. § 1362(6).

Deaton, 209 F.3d at 335-6. Thus, the Ninth Circuit was well within the mainstream of existing case law when it determined that CBM water, once removed from beneath the earth's surface by industrial activity, became a pollutant when discharged to the Tongue River and Squirrel Creek.

Nor is there any urgent policy reason for addressing the Ninth Circuit's holding on the pollutant issue. The effect of that holding is to require industrial operations such as Fidelity's to obtain permits before discharging their wastewaters into surface rivers, streams, irrigation canals, lakes, ponds, bays, estuaries, and wetlands. That requirement clearly poses no insuperable or unreasonable barriers to such operations, as demonstrated by Fidelity's own success in obtaining a permit once it applied for one.

By contrast, not requiring a permit for such activities would allow industry to pump up waters containing noxious substances and discharge them to pristine waterways without any advance approval by responsible government entities. As the record in this case demonstrates, such activities, particularly in the arid and semi-arid West, may contribute to the already significant problem of salinization of croplands as salty water is added to sources of water used for irrigation. *See* Pet. App. 4a-5a. Moreover, freeing such discharges from the requirement of advance governmental authorization would be particularly anomalous given that the CWA exempts the discharge of water produced by oil and gas extraction operations from the definition of a "pollutant" *only* when it is discharged in a disposal well approved by government authorities upon a finding that such disposal will not degrade ground or surface water quality. Allowing *unapproved* discharges of such waters to *surface streams* would turn the statutory scheme on its head by creating looser standards for such discharges than for the statutorily preferred method of returning such waters to the ground whence they came. *See, Cedar Point*, 73 F.3d at 568.

Nor is there any merit to Fidelity's contention that this case raises significant concerns about excessive

federalization of water pollution control. The CWA clearly imposes a federal requirement of an NPDES permit (issued through a federally-approved but state-operated program) when a pollutant is added to navigable waters from a point source. Whether a particular form of discharge meets that definition hardly raises grave concerns of federalism.[11]

Moreover, the suggestion that imposing this permit requirement would somehow intrude on Montana's control over its permitting program overlooks that even before the Ninth Circuit's ruling, Montana had already undertaken to issue an NPDES permit to Fidelity for some of its discharges (while denying a permit for others). In further recognition that discharges of CBM water are deleterious to irrigation water, Montana has just enacted, and EPA has approved, new water quality standards for salinity and SAR. A.R.M. § 17.30.670 (2003). Other Western states with CBM development such as Wyoming and Colorado also regulate CBM water discharges through the NPDES program. Thus the Ninth's Circuit's ruling, contrary to Fidelity's assertions, will impose no new regulatory requirements on the states or the oil and gas industry.

[11] In this respect as well, this case is quite unlike *Miccosukee*, where the issue is whether a state water management agency – not an industrial polluter – is subject to an NPDES permit requirement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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